**SGS Control Services, Inc. *and* Oil, Chemical & Atomic Workers International Union, Martinez Local 1–5 of Oil, Chemical & Atomic Workers International Union, AFL–CIO.** Case 32–CA–16559

August 1, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On a charge filed January 22, 1998, by Oil, Chemical & Atomic Workers International Union, AFL–CIO, Local 1–5 (the Charging Party or Union), the General Counsel of the National Labor Relations Board issued a complaint on April 9, 1998, against SGS Control Services, Inc. (CSI or Respondent), alleging that CSI violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On October 30, 1998, CSI, the Union, and the General Counsel filed with the Board a motion to transfer proceedings to the Board and stipulation of facts. The parties agreed that the formal documents, including, inter alia, the charge, complaint, and notice of hearing, and the answer to the complaint, the stipulation of facts, the certification of representative in Case 32–RC–4335, the Charging Party's proposed collective-bargaining provision on "Overtime Work," Respondent's letter to Charging Party dated December 4, 1997, the Charging Party's letter to Respondent dated December 19, 1997, the Charging Party's letter to Respondent dated December 30, 1997, the Respondent's notification to employees regarding payment of overtime dated January 6, 1998, Respondent's letter to the Charging Party dated January 10, 1998, Respondent's proposed collective-bargaining agreement provision on "Overtime Work," and the Order postponing hearing, shall constitute the entire record in this case. The parties further stipulated that no oral testimony is necessary or desired, that they waive a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge, and that they desire to submit this case directly to the Board for findings of fact, conclusions of law, and an order.

On December 4, 1998, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a Decision and Order. The General Counsel and CSI each filed briefs and answering briefs.

The Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

CSI, a New York corporation, with its headquarters and administrative offices in Edison, New Jersey, is in the business of inspecting and testing petroleum and agricultural products. CSI is a national organization operating out of approximately 41 separate facilities, located in 17 different states, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and including Richmond, California. During the past 12 months, Respondent, in the course and conduct of its business provided services valued in excess of $50,000 directly to customers located outside the State of California.

The Respondent admits, and we find that CSI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

*A. Facts*

The agreed-to stipulation of facts shows that since September 29, 1997, and continuing to date, the Union has been the exclusive representative for purposes of collective bargaining of the employees in the following appropriate unit:

> All full-time and regular part-time petroleum inspectors and agricultural inspectors employed by Respondent at its facilities located in Richmond and Torrance, California and Bellingham, Washington; excluding all other employees, guards, and supervisors as defined in the Act.

Since on or about November 6, 1997, Respondent and the Union have met for the purpose of negotiating a collective-bargaining agreement covering the terms and conditions of employment of the employees in the above unit. Negotiations for a collective-bargaining agreement are ongoing.

CSI's labor relations and employment policies and procedures have historically been, and are, centrally determined and administered by CSI's human resources department located at CSI's headquarters in Edison, New Jersey. All CSI employees' terms and conditions of employment are set forth in the "SGS Control Services, Inc. Employee Handbook"( Handbook), which is universally and uniformly applicable to all CSI employees. The Handbook has been in force and effect since approxi-

mately 1987. All CSI employees are provided a copy of the Handbook upon hire, as well as all revisions when made.

With respect to maximum hours of work and the payment of overtime, the Handbook expressly provides:

> Except where otherwise required by law, overtime will be paid only after 40 hours of work performed in one workweek.

CSI is subject to the Federal Fair Labor Standards Act (FLSA) and the states' laws regulating employees' wages and hours. Under the express provisions of the FLSA, states' wage-hour laws that mandate greater requirements than the FLSA, take precedence over the lesser requirements of the FLSA, and employers in such states must comply with the greater requirements mandated by those state laws.

With respect to nonexempt employees (which includes the unit employees at issue here), the FLSA requires that overtime be paid for all hours worked in excess of 40 hours in 1 workweek. The wage-hour laws of several states (including California) and jurisdictions in which CSI has facilities have or had a greater requirement, namely, that overtime be paid for all hours worked in excess of a certain number of hours in 1 day.

This case involves a unit composed of employees in California and Washington. In 1989 the State of California, through the California Industrial Welfare Commission (IWC), issued Wage Order 4–89, which mandated, inter alia, that overtime be paid for all hours worked in excess of 8 hours in 1 workday. Through December 31, 1997, in accordance with its Handbook provision, CSI paid its employees in California overtime for hours worked in excess of 8 hours in 1 workday, in compliance with California law.

On April 11, 1997, the California IWC issued and announced to the public changes to Wage Order 4–89, which, inter alia, conformed California's wage-hour provisions with the FLSA requirements pertaining to overtime pay, to be effective January 1, 1998. The new provision required overtime wages to be paid for hours worked in excess of 40 hours per workweek, and provided that "No overtime pay shall be required for hours of work in excess of any daily number." The new wage-hour provisions issued by the IWC were later upheld on appeals to the California courts.

In late Spring 1997, when CSI learned of the impending change in California wage-hour law, it determined that effective January 1, 1998, in accordance with its Handbook provision, it would cease paying to its California nonexempt employees overtime for work in excess of 8 hours in a workday. It would, instead, pay overtime only for hours worked in excess of 40 hours per workweek.

About August 1997 the Union conducted organizing activity among certain CSI employees in California and Washington, and an election petition was filed in Case 32–RC–4335. In the preelection period, the Union and CSI employees were aware of the changes in the California law effective January 1, 1998, and that CSI planned to pay overtime only after 40 hours of work in 1 workweek effective January 1, 1998. In fact, CSI employees sought union representation in whole or in part because of this development. Following a Board conducted election, the Union was certified as the collective-bargaining representative of the CSI employees in the above-mentioned unit.

On November 6, 1997, CSI and the Union met for the first time to conduct collective-bargaining negotiations. CSI's director of human services, Steven Bloom, represented the Respondent. Paul Ramirez, an International Representative who was temporarily sitting in for international representative Steve Sullivan and Local 15 Field Representative Jeff Clark, represented the Union. At this time, the Union submitted its proposals, which included a provision entitled "Overtime Work." This provision included, inter alia, a section calling for overtime to be paid for hours worked in excess of 8 hours for 1 day or 40 hours in 1 week, whichever is greater. Also during this meeting, Bloom stated that, "There are some changes that the company has considered prior to the OCAW's involvement, and that is the way in which overtime is paid in California effective January 1, 1998—we all know the law is changing out here." After Bloom's statement, there were no discussions regarding the payment of overtime.

On December 4, 1997, Jeffrey W. Pagano, Esq., notified Sullivan and Clark by facsimile letter that he would be handling negotiations for CSI. That same day, Sullivan called Pagano by telephone, and various subjects were discussed, including dates for negotiations. There was no discussion of overtime compensation at this time.

On December 5, 1997, Sullivan forwarded to Pagano a copy of the Union's bargaining proposals, including the proposals submitted on November 6.

By letter of December 19, 1997, from Sullivan to Pagano, Sullivan informed Pagano that at the November 6 meeting Bloom had stated that the Company was considering making some changes pertaining, inter alia, to the payment of overtime. Sullivan advised that under Board law, the Company could not make unilateral changes after the election, and that such action would constitute an unfair labor practice. Sullivan continued that the Union was putting CSI on notice that the Union insisted that

CSI make no unilateral changes concerning terms and conditions of employment of the unit employees without affording the Union an opportunity to bargain over any changes. This letter was the first time since the November 6 meeting that the subject of overtime compensation was raised.

Sullivan sent a letter to Pagano on December 30, 1997, regarding setting dates for negotiations, and requested that Pagano contact him by January 9, 1998, with available dates for negotiations.

On January 6, 1998, CSI notified all of its nonexempt employees in California, unit and nonunit, that pursuant to the changes in California's wage-hour law and the Handbook provision regarding the payment of overtime, effective January 1, 1998, overtime would be paid only for all hours of work in excess of 40 hours in a week.

As of January 1, 1998, CSI has paid its employees for overtime only for all hours worked in excess of 40 hours in a workweek.

On January 10, 1998, Pagano sent a letter to Sullivan, and enclosed the January 6 notice it had given to its employees. In the letter, Pagano expressed his surprise that Sullivan had not expressed any concerns he might have had with the alleged statement of Bloom at the November 6 negotiation before Sullivan's December 19 letter. Pagano continued that the Respondent would make no unilateral changes in terms and conditions of employment unless permitted by applicable law. He went on to explain that the change in paying overtime compensation to its California employees was in conformity with CSI's Handbook, which set forth the terms and conditions of CSI employees' employment, in conjunction with applicable California law. As the California law had changed effective January 1, continued payment of daily overtime would have been a unilateral change in the terms and conditions of employment of the California employees. He stated that overtime is a subject of bargaining and that the Respondent would entertain any proposals the Union may have in this regard.

The first negotiating session following this letter was on February 3, 1998. At that session, Pagano presented Respondent's contract proposals, including a proposal on overtime calling for the payment of overtime for hours worked in excess of 40 hours in a workweek.

Between February 3, 1998, and the signing of the stipulation of facts in early November 1998, the parties met at least 13 times for negotiations. In at least three of those sessions, Pagano raised the subject of overtime work. Discussions on this topic produced no agreement. At the time of the stipulation, negotiations were continuing, with no agreement on an overall collective-bargaining agreement. There is no contention that an overall impasse exists, and no contention that either party failed to engage in good-faith bargaining other than with respect to the change in overtime.

*B. Contentions of the Parties*

The General Counsel contends that the payment of overtime for hours worked in excess of 8 hours a day was an existing term and condition of employment for unit employees located in California at the time of the election and during the period of contract negotiations. Therefore, the unilateral change in the payment of overtime on January 1, 1998, in the absence of bargaining on the subject and, in the absence of an overall impasse in bargaining, violated Section 8(a)(5) and (1). According to the General Counsel, there is no evidence that the Respondent had "clearly decided" to change the overtime pay prior to the advent of the Union. In fact, the change in California law that Respondent claims caused the change in overtime pay was not affirmed by the California Court of Appeal until May 7, 1998, 4 months after Respondent made the change. The General Counsel further argues that there is no documentary evidence of when Respondent allegedly made its decision, or of any notification to the employees concerning the change prior to its implementation. The General Counsel relies on Bloom's statement at the November 6, 1997 negotiating session that Respondent was "considering" a change as evidence that no decision had been made. If an earlier decision was made, it was apparently abandoned before Bloom made his statement. Further, if, as Respondent contends, its Handbook provisions were the preexisting terms and conditions of employment, no "decision" would have to be made. However, Respondent claims to have made one. The General Counsel also argues that, in any event, the Handbook did not require the change in overtime payment. Finally, the General Counsel argues that because negotiations had begun prior to the change, Respondent was not free to implement the change in the absence of an "overall impasse" in negotiations.

The Respondent contends initially that no change in the terms and conditions of employment took place when overtime pay was changed in January 1998. Rather, its Handbook, which had been in effect since 1987, constituted the terms and conditions of employment for all of its nonexempt employees in all of its facilities, including those in California. The Handbook states that "Except where otherwise required by law, overtime will be paid only after 40 hours of work performed in one week." Its employees in California were paid overtime only after 40 hours of work up until 1989, when California laws dictated otherwise. There is also no provision in the Handbook mentioning overtime pay after 8 hours of work.

Respondent further contends that the stipulated facts clearly show that in the spring of 1997, when CSI learned of the change in California law, it "determined" that it would cease paying overtime after 8 hours of work and, in accordance with its Handbook provisions, again pay overtime to its California employees, unit and nonunit, only after 40 hours of work in 1 workweek. Also, as the stipulated facts show, the Union and CSI's employees were aware of the change in the California law to be effective January 1, 1998, and that Respondent "planned to pay overtime only after 40 hours of work" effective on that date. Therefore, assuming that there was a change in terms and conditions of employment, it was made, and the parties were aware of it, prior to the election.

*C. Discussion*

We find that by changing, effective January 1, 1998, its overtime policy to provide overtime pay only for hours worked in excess of 40 hours in a week, the Respondent made a "change" in its employees' terms and conditions of employment. The payment of overtime consistent with the then-current requirements of California law was an established practice. The Respondent's existing policy cannot fairly be read to say that the Respondent reserved the right unilaterally to take advantage of a future relaxation of state law requirements. Neither the new California law, nor the Respondent's policy, authorized or required the Respondent to take unilateral action to alter its overtime pay practice. Cf. *Watsonville Register-Pajaronian*, 327 NLRB 957, 958–959 (1999) (bargaining required over employer rule intended to qualify employees for statutory exemption from overtime requirements).[1] It is clear that an employer normally violates Section 8(a)(1) and (5) of the Act by unilaterally implementing, without notice to the union and affording the union an opportunity to bargain, changes in the terms and conditions of employment of its employees represented by the union. *NLRB v. Katz*, 369 U.S. 736 (1962).

However, as set forth in *Consolidated Printers, Inc.,* 305 NLRB 1061, 1067 (1992), if, before becoming obligated to bargain with the union, an employer makes a decision to implement a change, it does not violate Section 8(a)(5) by its later implementation of that change.[2]

The General Counsel submits that the Respondent did not make a firm decision before the election to make any change. We disagree. Here, the stipulation of the parties explicitly states that the Respondent, in the spring of 1997 and well before the Union was on the scene, had "determined" to change its method of paying overtime. The stipulation also sets forth that, in the preelection period, the Union and the employees were well aware that the Respondent "planned" to pay overtime after 40 hours of work in 1 workweek beginning January 1, 1998, when the California law became effective. Contrary to the General Counsel, we do not view these stipulated facts as "conclusory" and lacking in meaning and specificity. Rather, the stipulated facts establish the key point that the Respondent made its decision regarding overtime before the election.[3]

The General Counsel further contends that a statement of Respondent's representative, Bloom, at the parties' initial negotiation meeting on November 6, 1997, introduced some element of ambiguity regarding the Respondent's decision. According to the General Counsel, Bloom's statement supports his position that Respondent, as of November 1997, had made no final decision regarding overtime. Bloom stated that there were some changes that CSI "has considered" prior to the Union's involvement, including changing the method of paying overtime to conform to California law. However, Bloom's statement does not contradict the clear stipulated facts establishing that the Respondent's decision on this matter had been made before this date and that the Union and the employees were well aware of this decision. Bloom simply noted that the Respondent "has considered" certain changes. The fact that he failed to specify the results of that consideration does not controvert the fact that a decision had been made.

[1] Chairman Hurtgen concludes that Respondent never changed its terms and conditions of employment. Respondent's policy, at all times, was to pay overtime in excess of 40 hours per week, except where state law required something different. Prior to January 1, 1998, California law required payment of overtime after 8 hours per day. Respondent complied with that law. State law changed effective January 1, 1998. Accordingly, *pursuant to its never-changed policy*, Respondent began paying for overtime in excess of 40 hours per week. In sum, Respondent has never changed its policy.

Assuming arguendo that there was a change by Respondent, Chairman Hurtgen agrees with his colleagues that Respondent decided on that change prior to the election. Thus, when Respondent implemented that decision in January 1998, that action reflected the terms that existed prior to the election.

[2] In *Consolidated Printers*, supra, the judge found, and the Board agreed, that the employer had "determined" before a union election to work employees through the election and then to implement a layoff. Id. at 1067. In these circumstances, the Board found that the employer had no obligation to bargain about the postelection layoffs.

[3] As set forth in *Consolidated Printing*, supra, it is not essential that the precise date of the decision be established. 305 NLRB at 1061 fn. 2. The critical fact is whether the employer's decision predated the election.

In these circumstances, we find that the Respondent did not violate the Act when, consistent with its preelection decision, it implemented the overtime change on January 1, 1998. We will therefore dismiss the complaint.

ORDER

The complaint is dismissed in its entirety.